leasehold below 4704 feet. The first recital in the contract begins, "Whereas Midstates is the present owner of an oil and gas leasehold, insofar as said leasehold covers and applies to all horizons below a depth of 4704 feet subsurface * * *" The Court of Civil Appeals stated that this recitation created a doubt as to the intention of the parties to the 1941 contract. We disagree. The parties were dealing with gas produced below 4704 feet; and a recitation that one of the parties owned such rights is not, in context, to be taken as a declaration that such party does not own other rights.

In 1947 there was an agreement between United Gas Pipe Line Company, Midstates, and Alvord to release certain gas purchase contracts. The Court of Civil Appeals says this contract "settled the issue as to who owned the shallow mineral rights down to a depth of 4704 feet because Midstates thereby released all of its rights above 4704 feet." 408 S.W.2d at 773. We disagree. The only provisions of the 1947 contract which purport to release any rights of Midstates above 4704 feet are as follows:

> "* * * For the same consideration *Midstates does hereby release, discharge and relinquish any and all rights, if any, which it owns or might assert in said gas purchase contract* described in paragraph (b) * * * down to a depth of four thousand seven hundred four (4,704) feet * * * *together with any and all rights and options which it might have for the purchase and transfer from Alvord of any and all wells now situated on and producing from any properties covered by said gas purchase contracts* * * *."

The quoted language quite obviously does not release a *leasehold estate*; it releases only rights, if any, in a gas purchase contract under the terms of which the gas produced was sold to United Gas and an option which Midstates had under the terms of a 1941 contract to obtain certain wells from Natural [Alvord].

[3] The assignment of April 1941 which embodies the conditions and reservations of the contract to assign of March 1941 is so worded that it can be given a certain or definite legal meaning. Its terms are expressed without uncertainty. It is not ambiguous. Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154 (1951); Lewis v. East Texas Finance Co., 136 Tex. 149, 146 S.W.2d 977 (1941), and Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 136 S.W.2d 800, 127 A.L.R. 1217 (1940). The trial court therefore was correct in entering a summary judgment for Tenneco and the intervenors.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

HAMILTON, J., not sitting.

DELHI-TAYLOR OIL CORPORATION,
Petitioner,
v.
Will Ray HENRY, Respondent.
No. A-11582.

Supreme Court of Texas.
May 31, 1967.
Rehearing Denied July 14, 1967.

Action by invitee against occupier of premises for personal injuries sustained while working as a welder on premises under occupier's control. The 28th District Court, Nueces County, Horace S. Young, J., rendered judgment for invitee, which was affirmed by the Court of Civil Ap-

peals, 403 S.W.2d 885, and writ of error was granted. The Supreme Court, Calvert, C. J., held that owner or occupier of property owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden danger on the premises or to warn them thereof, and adequate warning to or full knowledge by independent contractor of the danger will discharge alternative duty of owner or occupier to warn the employees.

Judgments reversed.

1. Negligence ⇐50

An owner or occupier of land may relieve himself of liability for harm to his invitees from dangerous conditions on the premises which are not open and obvious by taking proper precautions to protect them from the danger or by warning them thereof.

2. Negligence ⇐48

Owner or occupier of land owes no duty to his invitees either to eliminate or to warn of dangerous conditions on the premises which are as well known to them as they are to him.

3. Explosives ⇐7

Warning given by occupier of land to officer of independent contractor and his foreman that buried lines on the property should be treated as though they were loaded, when considered with knowledge of officer and his foreman of the condition of the premises and the dangers inherent therein, was adequate to discharge occupier's duty to officer and his foreman.

4. Negligence ⇐48, 52

Owner or occupier of property owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden danger on the premises or to warn them thereof, and adequate warning to or full knowledge by independent contractor of the danger will discharge alternative duty of owner or occupier to warn the employees; overruling Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803.

5. Master and Servant ⇐150(8)
Negligence ⇐55

Independent contractor owes a duty to his employees to warn them of dangers on the premises where they are required to work which are known to independent contractor, and owner or occupier of the premises should not be required to foresee and anticipate that the contractor will not discharge his duty to his own employees.

6. Explosives ⇐7

Burden rested on independent contractor's injured employee, who brought action against occupier of premises where he was injured, to establish that the occupier breached a duty owed to him, and findings of jury that occupier was negligent in failing to take precautions to protect employee from danger of gas escaping from its pipeline did not establish that occupier had breached a duty owed to the employee, inasmuch as that duty could be discharged by warning employee of the danger.

Keys, Russell, Watson & Seaman, James C. Watson, Corpus Christi, for petitioner.

Hubert L. Stone, Jr., Auforth & Bonniwell, Fred C. Auforth, Corpus Christi, for respondent.

CALVERT, Chief Justice.

We granted writ of error in this case to review the holdings of the court of civil appeals with reference to the duty owed by an occupier of land to warn invitee-employees of an independent contractor of dangers on the premises which are not open and obvious.

Respondent, Will Ray Henry, an employee of Roy Vickers Lease Service, an independent contractor, suffered severe in-

juries while prosecuting the work of his employer on premises under the control of petitioner, Delhi-Taylor Corporation. Henry was engaged in welding operations when a dragline bucket, operated by another Vickers' employee, punctured one of Delhi-Taylor's pipelines which contained toluene, a highly flammable gas. The gas escaped and drifted into a ditch where Henry was working with his welding torch. The gas ignited and Henry was badly burned. His suit for damages was tried to a jury. The jury found that Delhi-Taylor negligently failed to inspect the toluene line to determine the amount of pressure therein before the dragline was used to uncover it, and negligently failed to release the pressure on the toluene line before the dragline was used to uncover it, and further found that such negligent omissions were proximate causes of the plaintiff's injuries. The trial court rendered judgment on the verdict awarding Henry a recovery of his damages as found by the jury. The court of civil appeals affirmed. 403 S.W.2d 885. We reverse the judgments of the courts below and here render judgment that the plaintiff take nothing.

Delhi-Taylor owns a refinery at Corpus Christi and owns and operates sixteen pipelines which carry various hydrocarbons from the refinery to the docks on the ship channel. The lines varied from two to sixteen inches in diameter and were buried in the ground at depths varying from four inches to ten feet. Roy Vickers Lease Service was employed by Delhi-Taylor to extend the casings around the pipelines where such lines passed under a private roadway. A dragline was used to uncover a twenty-four inch casing by digging a ditch three feet wide, ten feet deep and twenty-seven feet long. Some of the dirt removed in cutting the ditch was dumped temporarily over some of the other pipelines. Henry went into the deep ditch to weld the casing. The dragline operator then began to use the machine to remove the dirt covering the other lines. It was during this operation that the line containing the toluene was punctured. Toluene was not under pump pressure in the pipeline when it was punctured; that which was in the line was residual and the pressure which caused it to spurt out of the line was static pressure, with some slight pressure from thermal expansion.

[1,2] Vickers and his employees were on the premises as business invitees of Delhi-Taylor. The law is now well established in this State that an owner or occupier of land may relieve himself of liability for harm to his invitees from dangerous conditions on the premises which are not open and obvious by taking proper precautions to protect them from the dangers or by warning them thereof. Halepeska v. Callihan Interests, 371 S.W.2d 368 (Tex.Sup. 1963); Western Auto Supply Co. v. Campbell, 373 S.W.2d 735 (Tex.Sup.1963). The law is equally well established that the owner or occupier owes no duty to his invitees either to eliminate or to warn of dangerous conditions on the premises which are as well known to them as they are to him. McKee v. Patterson, 153 Tex. 517, 271 S.W. 2d 391 (1954); Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S.W.2d 497 (1952). In this context of established law, Delhi-Taylor contends here, as it did in the court of civil appeals, that although it may have failed, as the jury found, to take reasonable precautions to protect Henry from the danger of gas escaping from its pipelines, it is nevertheless not liable to Henry because its duty to warn him of the danger was fully discharged by warning given to and knowledge on the part of Henry's employer and his employer's foreman.

The court of civil appeals seems to have assumed that an adequate warning of the danger given to Vickers or to Vickers' foreman would have discharged Delhi-Taylor's duty to Henry; but that court held that the evidence did not establish as a matter of law that the warning given was adequate, and that Delhi-Taylor waived its right to a fact finding on adequacy by failing to request a jury issue thereon. We do not

agree with the holding of the court of civil appeals. It is our opinion that the evidence establishes conclusively that the dangerous condition on the premises which resulted in injury to Henry was, in the light of the warning given, as well known to Vickers and his superintendent-foreman, Bernie B. Smith, as it was to Delhi-Taylor.

Both Vickers and Smith had many years' experience in working on and around pipelines carrying petroleum products. Vickers had devoted a good bit of his time during fifteen years in the business to work which "necessitated the uncovering of buried lines," and was "thoroughly familiar with the work." According to him, it is "a fairly common practice" to uncover pipelines with a dragline, and "lots of times" he had used a dragline to uncover "loaded lines" or "gas lines under pressure." Smith had been district superintendent for Vickers for five years and had seventeen years' experience working around loaded pipelines. He had worked for a number of employers and had been a pipeline superintendent where he "had a double dose of loaded lines." According to Smith, the precautions to be taken when working around pipelines are standard, i. e., "* * * any existing line, you assume to be loaded * * *"

The very work which Vickers undertook for Delhi-Taylor was the uncovering of the dock loading lines and the placing of the lines in casings. Both Vickers and Smith were shown a plat of the lines before the work began. They knew the horizontal position but not the depth of the several lines. Smith knew of the general location of the lines from work done at the Delhi-Taylor plant on a prior occasion. He testified that everybody who worked around there knew the area as "pipeline alley."

Robert F. Wright who represented Delhi-Taylor in negotiating the contract with Vickers, testified that he made clear to Vickers and Smith that some of the lines would be in use carrying inflammable hydrocarbons while the work was being done; and that both were told that they should treat all the lines "as though they were loaded" and "as if they were under pressure." His testimony was not denied by either Vickers or Smith. Indeed, Smith confirmed the warning; he testified that Mr. Perkinson, Delhi-Taylor's foreman, "certainly did" make it "pretty clear that those lines were loaded"; that "Everybody knew it." As a matter of fact, Smith testified that he warned the dragline operator that "the lines were loaded," which, "in pipeline work," means "that the line is dangerous" and can be carrying any kind of "inflammable material," including "gasoline or natural gas."

[3] On the basis of the evidence set out, we hold that the warning given to Vickers and his foreman that the lines should be treated "as though they were loaded," when considered with their knowledge of the condition of the premises and the dangers inherent therein, was adequate to discharge Delhi-Taylor's duty to Vickers and his foreman. This holding brings us face to face with the question of whether an adequate warning to an independent contractor or one supervising his work will discharge the duty of the landowner or occupier to warn the employees of the independent contractor; and we hold it will.

[4] Our holding here is diametrically opposed to the holding made in Galveston-Houston Elec. Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803 (1924); and to hold as we do in this case, we must, and do, overrule that decision. In that case Reinle, an employee of an independent contractor performing services for Galveston-Houston Electric Ry. Co., was electrocuted when a boom he was operating came in contact with, or in close proximity to, an uninsulated high-voltage wire. We gave the following answer to a question certified by the court of civil appeals (258 S.W. 806):

"The court answers that it was the duty of the interurban company to exercise ordinary care to give Reinle notice or warning of the danger of the boom con-

ing in contact with, or in close proximity to, the uninsulated high-voltage wires, notwithstanding Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger."

Our opinion in *Reinle* and the record in the case on file with this court show that the issue decided was squarely presented. There is no sound basis for distinguishing that case from the instant case. *Reinle* must either be followed or overruled. With due respect for the rule of *stare decisis*, we are convinced that the rule of *Reinle* imposes an unfair and, indeed, an intolerable burden on an owner or occupier of land who employs an independent contractor to do work or to perform services on the premises. While an owner owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden dangers on the premises or to warn them thereof, an adequate warning to or full knowledge by the independent contractor of the dangers should and will be held to discharge the landowner's alternative duty to warn the employees.

There is no need to write at length in justification of our holding. It is in harmony with late court of civil appeals decisions. See Tyler v. McDaniel, 386 S.W.2d 552 (Tex.Civ.App.—Dallas 1965, writ ref'd n. r. e.); Texas Elec. Serv. Co. v. Holt, 249 S.W.2d 662 (Tex.Civ.App.—Fort Worth 1952, writ ref'd n. r. e.). It is in harmony with two late decisions of the United States Court of Appeals for the Fifth Circuit. See Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir. 1960); Turner v. West Texas Util. Co., 290 F.2d 191 (5th Cir. 1961). It is also in harmony with a number of decisions from other jurisdictions. See Storm v. New York Tel. Co., 270 N.Y. 103, 200 N.E. 659 (1936); Schwarz v. Gen. Elec. Realty Corp., 163 Ohio St. 354, 126 N.E.2d 906 (1955); Levesque v. Fraser Paper Ltd., 159 Me. 131, 189 A.2d 375 (1963); Hunt v. Laclede Gas Co., 406 S.W.2d 33 (Mo.Sup. 1966). The rationale for the holding can be found in the cited cases.

[5] On many projects there are a number of independent contractors, each employing scores of workmen. The identities of some of the workmen will change from day to day. To impose the duty on the owner or occupier of the premises to know and to warn every workman on the project of a dangerous condition would subject him to an impossible burden. Moreover, an independent contractor owes a duty to his employees to warn them of dangers on the premises where they are required to work which are known to him. This duty was recognized in *Reinle*. 258 S.W. 803, 805. The owner or occupier should not be required to foresee and anticipate that the contractor will not discharge his duty to his own employees, and there is no sound basis for requiring that the employees should be twice warned.

[6] The burden was on Henry to establish that Delhi-Taylor breached a duty owed him. McKee v. Patterson, 153 Tex. 517, 271 S.W.2d 391 (1954). He obtained jury findings that Delhi-Taylor was negligent in failing to take precautions to protect him from the danger of gas escaping from its pipeline. These findings did not establish that Delhi-Taylor had breached a duty owed him inasmuch as the duty owed him could be discharged by warning him of the danger. Not only did Henry fail to obtain a jury finding of breach of the duty to warn, but the evidence establishes conclusively, as pointed out herein, that the duty was not breached. The judgment in Henry's favor cannot stand.

The judgments of trial court and court of civil appeals are reversed and judgment is here rendered that plaintiff take nothing.

any contractual relations between the parties providing for attorney fees or expenses. We quote from Turner v. Turner, Tex.Sup. Ct., 385 S.W.2d 230, 233, as follows:

"The general rule of law in this state is that, unless provided for by statute or by contract between the parties, attorney's fees incurred by a party to litigation are not recoverable against his adversary either in an action in tort or by suit upon a contract. Van Zandt v. Ft. Worth Press, 359 S.W.2d 893, 896(5), Tex.Sup. 1962; Perry v. Leuttich, 132 Tex. 159, 121 S.W.2d 332, 333 (2-4), 1938; Wm. Cameron & Co. v. American Surety Co. of New York, 55 S.W.2d 1032, 1035 (3), Tex.Com.App., 1932; Sherrick v. Wyland, 14 Tex.Civ.App. 299, 37 S.W. 345, 1896"

We feel that such rule of law is applicable here.

[12] The judgment included recovery by plaintiff of $955.00 in attorneys fees, and $94.59 in expenses, to be paid from money on deposit with the court, and with appellees' attorney. Since only the appellants, representing a 1/12th interest in the property and the proceeds, have appealed, and since they alone have complained of the allowance of the attorneys fees, it is our holding that the judgment be reformed so as to deduct 1/12th of the sum allowed as attorneys fees, and expenses, and add such amount to the appellants' portion of the sums on deposit decreed to be distributed to the joint owners of the property.

Consideration of appellants' remaining points Nos. 11, 12, and 13 is, by their brief, made to depend upon the correctness of their contentions that the title to this land remained in or reverted to appellants, as raised in their points 1-8 inclusive. Since we have overruled these points and held adversely to these contentions, points 11, 12, and 13 are also overruled.

The judgment of the trial court is reformed, so that the amount of attorney's fees and expenses allowed to plaintiffs' attorneys is reduced by 1/12th thereof, and such 1/12th is added to the sum ordered to be paid to appellant Della Portia Clark in the distribution of the assets on deposit in the registry of the trial court.

Costs of the appeal are assessed two-thirds against appellants and one-third against appellees.

Reformed and affirmed.

DELHI-TAYLOR OIL CORPORATION, Appellant,

v.

Will Ray HENRY, Appellee.

No. 125.

Court of Civil Appeals of Texas.

Corpus Christi.

May 12, 1966.

Rehearing Denied June 9, 1966.

Invitee brought action against occupier of premises for personal injuries sustained while working as a welder on premises under occupier's control. The 28th District Court, Nueces County, Horace S. Young, J., rendered judgment for invitee and occupier appealed. The Court of Civil Appeals, Nye, J., held, inter alia, that warning that pipelines were charged, meaning that they were under pressure from gas contained in them, was not a warning of danger sufficient as a matter of law to charge invitee with knowledge and appreciation of the risk and danger of working on pipelines.

Affirmed.

1. Negligence ⇐32(1), 48

Occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees

and has a duty to inspect and discover dangerous conditions.

2. Negligence ⇐48

Occupier of premises has duty to protect his invitees from dangers of which occupier knows or because of his duty to inspect should know in the exercise of ordinary care.

3. Negligence ⇐50

Occupier of premises is under a duty to take such precautions as a reasonably prudent person would take to protect invitees from dangers which are not open and obvious or to warn them thereof.

4. Negligence ⇐121(1)

In the no duty invitee cases, where danger is alleged to be open and obvious, plaintiff must prove existence of a duty on part of occupier of premises and a breach of that duty.

5. Negligence ⇐68

Invitee may assume premises are in good condition and is under no duty to inspect them for defects.

6. Negligence ⇐105

If after being warned of danger on premises, invitee nevertheless proceeds to encounter the danger, he does so at his own risk.

7. Explosives ⇐7

Warning that pipelines were charged, meaning that they were under pressure from gas contained in them, was not a warning of danger of gas explosion as a matter of law, sufficient to charge plaintiff, who was an invitee and who was injured in gas explosion while working as a welder, with knowledge and appreciation of the risk and danger of working on pipelines.

8. Negligence ⇐52

To discharge duty of warning of danger on premises, occupier must give invitee both knowledge of the danger and an appreciation of the danger.

9. Explosives ⇐7

Occupier of premises who knew that dragline could puncture lines containing flammable gas and who knew that invitee was welding with a lighted torch in the immediate proximity of dragline operations had a duty to warn invitee so that invitee could have knowledge and appreciation of the danger involved.

10. Trial ⇐388

Occupier of premises who did not request, in invitee's action for injuries, issue as to whether it warned invitee of danger on the premises waived defense of warning. Rules of Civil Procedure, rule 279.

11. Explosives ⇐7

Finding that occupier of premises could have foreseen that dragline might puncture pipeline containing toluene gas under pressure and that flammable hydrocarbons would then be ignited by the operation of invitee's welding torch was supported by evidence, including evidence that occupier's job supervisor had seen such a thing happen before.

12. Explosives ⇐7

Danger from pipelines containing flammable gas was not as a matter of law open and obvious to invitee who was welding a pipeline with a lighted torch in immediate proximity of dragline operation where dragline punctured pipeline and invitee was injured in resultant fire.

13. Negligence ⇐52

If premises occupier's superintendent observed an employee of independent contractor, who was working on premises, at-

tempting to perform a dangerous act it was his nondelegable duty to notify or warn employee of danger.

14. Trial ⇐366

Occupier who did not request issue as to whether it would be negligence for dragline operator to drop bucket from great height onto gas pipeline waived defense of dragline operator's negligence in action by invitee for injuries sustained from fire that broke out when dragline bucket punctured pipeline containing flammable gas near where invitee was using a lighted welding torch. Rules of Civil Procedure, rule 279.

15. Explosives ⇐7

Occupier for whom invitee was engaged in welding work on a pipeline containing flammable gas when he was burned after dragline bucket punctured pipeline had duty to reduce danger to invitee by releasing pressure in pipeline where he knew location of pipes, knew which pipes were under pressure, and was capable of releasing pressure.

16. Negligence ⇐10

Although one is generally not required to anticipate the negligent conduct of another, where one has knowledge of facts which place him on notice that an accident might occur, the negligent conduct of another party does not prevent a finding of negligence on part of the one who had notice.

17. Appeal and Error ⇐1064(1)
Explosives ⇐7

Failure to instruct jury on anticipated negligent conduct or on definition of a contractor was not error, or if error was harmless, in action by invitee for injuries sustained when flammable gas ignited while invitee was working as a welder on premises under occupier's control where occupier knew that gas pipelines were under pressure, that dragline bucket was capable of puncturing a line and that if line was punctured gas could be ignited by invitee's lighted welding torch. Rules of Civil Procedure, rule 434.

18. Explosives ⇐7

In action for injuries sustained by invitee when flammable gas ignited while invitee was working as a welder on premises under occupier's control, admission of evidence as to safety of using a dragline to uncover pipelines carrying flammable gas was not error where evidence was cumulative to other evidence that concerned dragline operations and had been received without objection by occupier.

19. Appeal and Error ⇐1170(7)

Even if admission of evidence concerning safety of use of dragline to uncover pipelines carrying flammable gas was error in action by invitee to recover for injuries sustained when gas ignited while invitee was working as a welder on premises under occupier's control, error was harmless since it was not determinative of any ultimate issues and was not such as to cause rendition of improper judgment. Rules of Civil Procedure, rule 434.

20. Negligence ⇐124(1)

Evidence as to indemnity provisions in rate schedule of contract between invitee's employer and occupier was not erroneously excluded in action by invitee for injuries sustained while working as a welder on premises under occupier's control.

21. Appeal and Error ⇐1170(7)

In action by invitee for injuries sustained when flammable gas ignited while invitee was working as a welder on premises under occupier's control, any error in permitting testimony by expert witness as to construction job done for navy involving gasoline lines was cured by elaboration on cross-examination. Rules of Civil Procedure, rule 434.

22. Damages ⇐132(7)

Award of damages totaling $105,306.52, including award of $85,000 for past and present physical pain and mental suffering and loss of earning capacity, was not excessive where invitee's medical expenses totaled nearly $20,000, invitee, whose life expectation was approximately 30 years at time of accident, was permanently disabled from doing any active outdoor work, invitee was severely burned over 85% of his body with second and third-degree burns, his entire face was covered with first-degree burns with some resultant scarring, he sustained loss of motion in left elbow and hand and permanent injury to left leg and he was hospitalized for three months, much of the time in severe pain which was not controlled by drugs because of possibility of addiction.

James C. Watson, of Keys, Russell, Watson & Seaman, Corpus Christi, for appellant.

Fred C. Auforth, Hubert L. Stone, Jr., Corpus Christi, for appellee.

OPINION

NYE, Justice.

This is a personal injury suit. Will Ray Henry, the appellee, brought suit against Delhi-Taylor Oil Corporation to recover damages for extensive burns received by him while working as a welder on the premises then under the control of Delhi-Taylor Oil Corporation, the appellant here.

The case was tried to a jury, and in response to the answers of special issues, judgment was entered in favor of Henry for the sum of $105,306.52. The Hartford Accident and Indemnity Company, one of the appellees, the workmen's compensation insurer for the employer of Henry, intervened to recover the sum of $32,986.52 to which it was subrogated. Its appearance was only for the court and was not shown to the jury.

Delhi-Taylor Oil Corporation, the appellant, engaged Roy Vickers Lease Service to do some rather extensive work on its pipelines running from its refinery in Corpus Christi to the docks on the ship channel at the Port of Corpus Christi. The appellant owned and operated sixteen pipelines which carried various hydrocarbon products from the refinery to the port. These dock loading lines ran generally downhill from the refinery to the port and across property owned by Columbia Southern Corporation from whom appellant had obtained an easement of right-of-way. Columbia Southern had decided to widen its entrance roadway which crossed at right angle to these pipelines. Under the provisions of the easement agreement, Columbia Southern notified appellant that it must extend the casings around each of the pipelines so that road material could be placed on top of the pipes and the road widened at that point. These sixteen pipelines had been installed periodically by the appellant over the past thirty years as the need demanded. The lines varied from two inches to sixteen inches in diameter and were buried in the ground at depths varying from four inches to ten feet.

The particular job that the appellant was undertaking called for extending the casings (simply placing a larger pipe around each pipeline so that any of the pipelines could be removed thereafter at any time from under the road without disturbing the road material) as a part of phase one of this job. Phase two of the job was the cutting and lowering of all of the pipelines to a particular uniform depth. This second operation required that all the lines be drained and emptied.

Appellant hired Vickers to do the work on a labor and equipment rental basis. This was required by the appellant because it was most difficult to ascertain in advance the exact type of work that needed to be performed because of the age and condition of some of the pipelines. Some of the pipelines had corroded and would be in need of welding repairs, doping and wrapping

before they were put finally at rest underneath the road. No one knew how much work would be required. Vickers submitted to appellant its standard printed rate schedule outlining the hourly rates for each man and the type of work they would perform and the various types of equipment proposed to be used on the job. Other than submitting the printed rate schedule to the appellant, the contract of employment was oral. It was understood that the appellant would furnish a construction superintendent who was to consult with and determine what repairs were to be made to the existing pipelines. He would represent the appellant at the jobsite and determine to his satisfaction the progress of the work. It was further understood that the contract of employment could be terminated at any time by the appellant's superintendent.

In addition to the casings for the sixteen dock loading lines, appellant had a large twenty-four inch casing in the easement and under the existing entrance roadway which had no pipelines running through it, as it was for future use only. This large two foot casing was buried approximately ten feet deep and was also to be extended by Vickers. It was necessary for a huge ditch to be excavated into which a casing extension would be lowered and welded to the existing casing. At first the ditch was being dug by a back-hoe (a tractor with a flexible digging arm) but it became obvious that this machine could not complete the job. Appellant's superintendent, Perkinson, directed Vickers to bring out a dragline to perform this excavation. The ditch was to be three feet or more wide, twenty-seven feet long, and approximately ten feet deep. The amount of dirt removed from the excavation was voluminous. Part of the dirt was placed on the side of the road and the rest of it in the easement which was an overburden on the existing pipelines in the easement.

After the ditch had been dug, a twenty-four inch casing pipe was lowered into the ditch by a special machine and held in place so that it could be welded onto existing casing under the road. Henry, the appellee, was an employee of Vickers and was ordered down into the ten foot hole to weld the two pieces of twenty-four inch pipe. Unknown to him, the dragline was moved around some twenty or thirty feet from the existing hole, to remove the pile of dirt overburdening the existing pipelines so that the next pipe could be uncovered and casing placed around it.

Mr. Perkinson, the appellant's superintendent, watched the dragline dig the large ditch and then move over and uncover the lines. He then left the jobsite to return a transit to his office. While Perkinson was gone the dragline operator continued to uncover the lines and as he was uncovering a second line, the teeth of the dragline bucket punctured a ten inch dock loading line containing liquid toluene under pressure. Toluene is a highly flammable hydrocarbon petroleum product described as being similar to gasoline and which is sometimes used as a blend to gasoline. The fluid toluene spirted up into the air, arched over and downwind some twenty feet and into the hole where the appellee Henry was welding, saturating his clothing. The toluene ignited from Henry's torch and the entire hole became a mass of flames, burning Henry over approximately eighty-five per cent of his body, with first, second and third degree burns. He was able to extricate himself from the hold and fellow workmen were able to tear off his clothes and put out the fire. As a result of his burns appellee Henry was in the hospital some three months, incurring medical expenses of approximately $20,000.00.

The toluene line which sloped from the refinery toward the dock was not under pump pressure at the time, but the line was full of toluene under static pressure, and possibly a slight pressure from thermal expansion. The static pressure was described as being the weight of the liquid in the pipeline from the point of puncture uphill to the refinery. It was likened to a barrel full of liquid with a hole punched in at the bottom. The weight of the liquid

would squirt the fluid out until it had drained down to the hole. As soon as the line drained to the point where the pipe was punctured, the toluene ceased to flow and the fire at the jobsite was quickly brought under control by fire-fighting equipment.

The work to be performed by Vickers and his employees was considered to be very hazardous. Both Mr. Wright, appellant's engineer in charge of contractual arrangements, and Perkinson, appellant's onsite superintendent, had considered the work as being hazardous. Perkinson had considered that one of the hazards was exactly what had happened on this occasion. He admitted that while he was supervising another pipeline job for the appellant's plant, some five years previous to this accident, a dragline bucket had punctured a pipeline. Both parties admit that Vickers and his personnel were business invitees.

Appellee Henry plead that defendant-appellant owed him a duty to provide him with a safe place to work; that appellant owed him a duty to inspect the premises and to warn such invitees at the jobsite of dangerous conditions discovered by such inspection, as well as dangerous conditions known to appellant by reason of its intimate knowledge of the pipelines from the date of their original installation to the time of the accident. Pleading further, appellee contended that the appellant owed said business invitees that additional duty to take such action to protect them from injuries as would have been taken by a reasonably prudent controller of the premises. Appellee Henry plead that the appellant knew that the pipeline which sprayed toluene on appellee Henry contained toluene under pressure, that the appellant knew that the dragline was being used to uncover pipelines and that such operations carried with it the risk of rupturing such pipes. Appellee Henry contended that appellant breached and violated the duty owed to the appellee. Among others, the appellee plead that the appellant breached and violated the duty to release the pressure on the toluene line before the dragline was used to uncover the same, and to inspect the toluene line to determine the amount of pressure therein before the dragline was used to uncover the same.

The defendant-appellant, Delhi-Taylor Oil Corporation, answered contending that it was guilty of no negligence and violated no duty to appellee Henry; that Vickers, appellee's employer, was an independent contractor, and knew of the method of doing the work and the work to be accomplished by the dragline, and was aware that there were numerous pipelines in the area transporting petroleum products which were highly inflammable; appellant denied that its job superintendent Perkinson was in control of the work and at no time intended to direct the detailed operations or methods in which the work was to be conducted. Appellant specifically denied that it owed any duty to Henry, the appellee, or to any other employees of Vickers to provide them with a safe place to work, as this was the obligation of Vickers only. Appellant plead further that the accident was not caused by any negligence or any breach of any duty on the part of appellant, but was solely caused by the acts or failure on the part of the dragline operator, the employee of Vickers. Pleading further, appellant answered that the injuries to Henry were the result of an unavoidable accident or were proximately caused by a new and intervening agency or a new and intervening cause so that if there was any negligence or breach of duty on the part of appellant, it constituted a mere prior or remote cause and that the acts and failure of the dragline operator constituted an immediate and producing cause of the injuries.

The jury, in answer to a number of special issues found: (1) That the defendant Delhi-Taylor Oil Corporation had the right to control the pressure in the toluene line on the occasion in question; (2) that Delhi-Taylor Oil Corporation failed to release the pressure on the toluene line before the dragline was used to uncover the same; (3) that that was negligence, (4) and a proximate cause of the injuries in question;

(5) that the appellant Delhi-Taylor Oil Corporation failed to inspect the toluene line to determine the amount of pressure therein before the dragline was used to uncover the same, (6) and that that was negligence, (7) and a proximate cause of the injuries in question. (8) The jury further found that appellant Delhi-Taylor Oil Corporation had the right to control which machines were to be used to uncover the toluene line; (9) that appellant did not direct Vickers' foreman to use the dragline to uncover the toluene line in question. (Special Issue No. 10 inquired as to whether Special Issue No. 9 was negligence; it was not answered and Special Issue No. 11 as to proximate cause being conditionally submitted, was also not answered). (12) The jury found that the toluene line was punctured by the dragline bucket being dropped on it; (13) they found that the dropping of the dragline bucket was not the sole proximate cause of the injuries to Will Ray Henry; (14) the injuries to Henry were not the result of an unavoidable accident; (15) that the damages sustained by Henry as a direct result of his injuries amounted to $85,000.00; (16) that the doctors, hospital, nursing, and other medical expenses incurred by Henry amounted to $19,806.52, and (17) future medical in the amount of $500.00.

The appellant did not plead the affirmative defense of volenti non fit injuria, nor did it plead that if it owed a duty to Henry, that it protected or warned. The appellant did not rely upon the common law issues of contributory negligence and proximate cause.

Prior to the commencement of the work, the appellant's engineer told Vickers and his foreman that all of the sixteen dock loading lines were to be considered as "loaded". Both parties agree that the condition of the premises and the dangers were not open and obvious of which invitees knew or of which they were charged with knowledge as a matter of law. It was also undisputed that there was no protection given to the business invitee or his servants of the dangers complained of.

Appellant's first point is that the trial court erred in entering judgment for appellee because under the facts of this case as a matter of law, appellant as an occupier of the premises owed no duty to appellee as an invitee on the premises, except to warn of existence of flammable materials in the pipelines, and this duty was discharged by the warning given by appellant to the employer, and the employer's superintendent, of appellee.

[1-6] The occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees. This includes a duty of the occupier to inspect and discover dangerous conditions. Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853 (1950); Genell, Inc. v. Flynn, 163 Tex. 632, 358 S.W.2d 543 (1962). This duty on the part of the occupier of premises is to protect his invitees from dangers of which he, the occupier, knows, or because of his duty to inspect, of which he should know, in the exercise of ordinary care. "* * * If there are dangers which are not open and obvious, he is under a *duty* to take such precautions as a reasonably prudent person would take to protect his invitees therefrom or to warn them thereof. * * *" Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, at page 378 (Supreme Court 1963). In the "no duty" invitee cases the plaintiff must prove the existence of a duty on the part of the occupier and a breach of that duty. This burden is carried into the wording of the special issues. This duty of the occupier of the land or premises as to his invitees, is the duty to keep the premises in a reasonably safe condition. His duty is defined to require that he inspect the premises to discover defects and dangers. On the other hand the invitee may assume that the premises are in good condition. He is under no duty to inspect them for defects. The occupier has a duty to protect

his invitees from dangers of which he, the occupier, knows or which because of his duty to inspect, he should know. If the premises are unsafe, the duty of the occupier is to warn or protect the invitee. For if the premises are unsafe and the danger is not open and obvious, how can the plaintiff know and appreciate the danger if he is not warned? If, however, after being warned, the invitee nevertheless proceeds to encounter the danger, he does so on his own risk. The duty is to protect or warn. The doing of either discharges the occupier's duty.

[7-10] Here the plaintiff plead that the pipelines under pressure were a dangerous condition and that the appellant had the duty to control the pressure in the toluene line on the occasion in question. The jury found that the appellant had the right to control the pressure in the toluene line and failed to release the pressure on the toluene line before the dragline was used to uncover the pipeline and that was negligence and a proximate cause of appellee's injuries. The jury found that appellant failed to inspect the toluene line to determine the amount of pressure therein before the dragline was used and that was negligence, and a proximate cause of the injuries. Since this danger was not open and obvious as a matter of law, and it is undisputed that the appellant did nothing to protect or make the premises reasonably safe for this particular work, then appellant's only defense hinges on whether or not the appellee was warned. Was the general warning sufficient to charge the appellee (or the appellee through his employer) with knowledge and appreciation of the dangerous condition? It was the clear holding of the Supreme Court in Robert E. McKee, General Contractor v. Patterson, 153 Tex. 517, 271 S.W. 2d 391 (1954), in Dee v. Parish, 160 Tex. 171, 327 S.W.2d 449 (1959), in Halepeska, supra, and in the recent decision of the Supreme Court in Ellis v. Moore, Tex., 401 S.W.2d 789 opinion of Court of Civil Appeals, 385 S.W.2d 261, that knowledge is not enough.

"* * *. There must be knowledge of the danger involved and the appreciation of the danger. This Court pointed out in Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953), that there must be knowledge and appreciation of the particular danger involved so that the plaintiff proceeds to encounter the risk as the result of an intelligent choice. * * * Where the assumed risk doctrines of 'no duty' or volenti are invoked, the duty of the defendant is to exercise ordinary care to make reasonably safe or to warn. * * * The function of the warning is to give the plaintiff knowledge and an opportunity to appreciate the danger. He then can decide whether to confront the danger. * * *" Ellis v. Moore, supra.

Here the appellant argues that he warned appellee's employer to the effect that the lines were "charged". Even if there was a general warning, we cannot say that this was a warning of the danger as a matter of law, sufficient to charge the appellee with knowledge and appreciation of the risk and danger. In Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S.W.2d 497, our Supreme Court held that the basis for liability in the "no duty" case is the superior knowledge of the danger on the part of the occupier. The appellant knew that the lines were under pressure of highly inflammable hydrocarbons. The appellant knew that a dragline was operating in, around and over these lines. The appellant knew that a dragline could puncture one or more of the pipelines (the job superintendent had a similar experience before). The appellant knew further that the appellee was welding with a lighted torch in the immediate proximity while the dragline was operating. Appellant did not say, "you better not use the dragline while the welder is operating with a lighted torch." The appellant did not say that the welder should cease welding while the dragline was operating in the proximity of the pressurized lines. The appellant did not tell the appellee's employer to cease these operations until they could

release the pressure on the pipelines. Appellant did not say that these operations should be conducted with hand tools or other devices. There was no complete disclosure of the danger. We hold that the appellant had a duty to warn, so that the appellee could have had the knowledge and appreciation of the danger involved. This was not done. There were no issues requested or submitted by appellant as to warning, nor did appellant plead that he warned appellee. If appellant wished to escape legal responsibility, by relying upon warning, then the appellant had the responsibility to request an issue as to whether it had warned the appellee. Western Auto Supply Company v. Campbell, 373 S.W.2d 735, (Supreme Court 1963). Since appellant did not request such an issue, then it was waived. Allen v. American National Insurance Company, 380 S.W.2d 604, (Supreme Court 1964); Rule 279, Texas Rules of Civil Procedure.

In Wood v. Kane Boiler Works, 150 Tex. 191, 238 S.W.2d 172 (1951), the plaintiff's knowledge that some of the pipe might be defective (here, that the pipelines were loaded) was much greater than in the instant case, where appellant's superintendent had made only a general statement to the contractor's foreman before appellee's employment to consider the lines loaded. Appellee had no specific knowledge thereof. In Halepeska the Court said that the decision to incur the risk must have been deliberate * * * a result of an intelligent choice. Harvey v. Seale, 362 S.W.2d 310, (Supreme Court 1962). The Court further stated that the duty owed was "* * * a complete disclosure of the danger." The nature of the warning must be such that the invitee is vested with full knowledge of the nature and extent of the danger involved such that, knowing of the particular risk involved, he can make an intelligent choice between retreating from that danger or exposing himself to it. Chickasha Cotton Oil Company v. Holloway, 378 S.W.2d 695, ref. n. r. e. The knowledge and appreciation that our Supreme Court speaks about, is not present here.

[11] The appellant argues as one of its points, that there was no evidence of foreseeability to support the negligent or proximate cause issues found against it upon which its duty rested. While appellant was under a duty to exercise ordinary care against dangers of which it knew, or dangers of which it should have known, the appellant contends that there was no evidence to show that it should have, in the exercise of ordinary care, foreseen the danger that caused the injury to appellee Henry. This exact contention was made in Ellis v. Moore, supra. There the defendant pointed out that the three-fork lift used by Harold was in good order. Here appellant contends that the pipe was in good condition. There they complained that the use (or mis-use) of the lift caused the injury. Here the appellant complains that the dragline bucket was dropped and its mis-use caused the injury to Henry. In Ellis they contend that it was not the defective cylinder lift which Harold knew to be defective and which he was using, that caused the injury. In this case appellant contends that it was not the pressure in the toluene line which the appellee Henry knew (or was charged with knowledge through his employer) that caused Henry's injuries. In Ellis the defendants contended that as a matter of law they could not foresee that Harold would attempt to use the three-fork hitch to lift the discs and that even if he did, that he would fail to release the clutch if the front end came off the ground and that the tractor would overturn and injure Harold. In our case defendant contends that it could not foresee that the use of dragline and the operation of the lighted torch would cause an injury even if the dragline bucket was dropped and punctured the pressurized toluene line, and that the toluene would spray and ignite appellee. The Supreme Court in Ellis disagreed and said:

"* * * we cannot say as a matter of law that McCrary (defendant) could

not foresee that if Harold did use the three-point hitch, he might not skillfully apply the clutch and throttle when the tractor's front wheels left the ground."

We cannot say as a matter of law that appellant could not foresee that the dragline might puncture the toluene line under pressure and that flammable hydrocarbons would be ignited by the operation of Henry's welding torch.

The defendant did not plead volenti non fit injuria nor did it request or submit an issue as to whether or not a danger existed to which the appellee voluntarily exposed himself. Volenti non fit injuria is not in this case.

[12] Appellant contends that Vickers was an independent contractor and although the relationship of appellant and appellee was that of an owner and occupier of the premises and a business invitee, the appellant owes no duty to the appellee except the exercise of ordinary care to keep the premises safe for the use of persons invited to use the premises for business purposes. Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (1950); Robert E. McKee General Contractor v. Patterson, supra. Appellant argues in effect that when a business invitee performs a particular job as an independent contractor, he is in effect charged with knowledge of the dangers incident to such work, and that the owner has no duty to warn such invitee with respect to conditions which are as a matter of law, open and obvious, and that he takes the premises as he finds them. Appellant says there is no duty on the part of the owner to protect such invitee even by the use of reasonable precautions to eliminate the hazards. Citing Marshall v. San Jacinto Bldg., Tex.Civ.App., 67 S.W.2d 372, wr. ref.; Harvey v. Seale, 362 S.W.2d 310 (Supreme Court 1962). Appellant pleaded in effect that it owed no duty as a matter of law because the danger and/or condition was so open and obvious that as a matter of law it was not liable for the injuries. We fail to see the relevancy of appellant's argument under the facts of this case. The danger was not open and obvious as a matter of law.

[13] Appellant argues that it retained no control over the work except to see that the work was performed satisfactorily. Appellant argues that the general rule is that the owner-contractee is not liable for injuries sustained by employees of an independent contractor in the performance of the work which has been engaged; that although an exception to the general rule exists where the employer of the contractor retains control over the operative details and the right to direct the manner in which employees of the contractor perform their work, this exception did not apply to the appellant since it did not exercise that degree of control. Citing Allen v. Texas Electric Service Company, 350 S.W.2d 866, Tex.Civ.App., ref. n. r. e. (1961). Although appellee's employer was called an independent contractor he was nonetheless a business invitee. Appellant's superintendent was present at the jobsite and knew and observed the work that was being performed. He had the right to control which machines were to be used (the jury so found) and what work was to be done. If appellant's superintendent observes an employee of an independent contractor attempting to perform a dangerous act it is his nondelegable duty to notify or warn said employee of such danger. Texas Electric Service Co. v. Holt, 249 S.W.2d 662 at 667, Tex.Civ.App. 1952, ref. n. r. e. The mere fact that Vickers was called an independent contractor does not mean that appellant did not retain extensive control as to general and specific results of the work. In any respect the mere fact that appellee's employer was an independent contracter is not determinative under the facts of this case, for if it was a factor, then the Halepeska, Bosworth, Knoten, Smith and Albritton cases and other authorities would not be in point. Halepeska v. Callihan Interests, Inc. (Supreme Court 1963), 371 S.W.2d 368; Continental Paper Bag Co. v. Bosworth (Tex.

Civ.App.1919) 215 S.W. 126; Sun Oil Co. v. Kneten, 5 Cir., 164 F.2d 806; Smith v. Henger, supra; Sunray Oil Corporation v. Albritton, D.C., 88 F.Supp. 54; 5 Cir., 187 F.2d 475, Appellee's employer's contract was upon an equipment rental hourly basis and his employment was determinative at the will of appellant.

Appellant contends in his fourth point that as a matter of law, the negligence of the dragline operator in allowing the dragline bucket to drop from a height of approximately five feet constituted the sole cause of appellee's injuries or that it was a new and independent cause breaking any causal relationship between the pressure in the toluene line and the fire which injured appellee. Appellant argues that the dragline bucket was negligently and carelessly dropped onto the toluene line from approximately five feet in a free fall with the bucket teeth pointing straight down.

[14] The question of whether the dragline bucket was dropped or not and from what height, was a hotly disputed fact issue. In fact, appellee contends that the greater weight and preponderance of the testimony was to the effect that the bucket was not dropped. It is not necessary for us to decide this contention of the appellee. Appellant did not request any issue as to whether it would be negligent conduct for a dragline operator to drop the bucket from the height at which it was dropped. If the negligent and careless operation of the dragline was a part of appellant's defense of contributory negligence, as it argues now in this court, then the burden of requesting this issue and the securing of a favorable jury answer thereon, was on the appellant, in view of the conflict in the evidence. Since it was not requested it was waived. Rule 279, T.R.C.P.; Goodwin v. Southtex Land Sales, 243 S.W.2d 721, Tex.Civ.App. 1951, ref. n. r. e.

In any respect this point of appellant is overruled because the jury found that even if the dragline bucket was dropped it was not the sole proximate cause. Appellant's points one through five are overruled.

Appellant's points six through fifteen are briefed together and will be considered together by this court. Appellant contends under these points that the trial court should not have submitted special issues 2 through 8 or should have disregarded them on appellant's motion and the trial court should have submitted appellant's requested special instructions to the effect that one is not required to anticipate negligent conduct and a further instruction on the definition of independent contractor.

[15] Appellant argues in effect under these points, that there was no duty to release the pressure in the lines and that there was no evidence that there was a feasible or practical way of completely shutting down the refinery, to drain all of the lines in anticipation of this injury. The evidence showed that the contract was a two phase contract, the second phase of which required that each line be drained and cleaned so that it could be cut, lowered and rewelded into place. The appellant knew which lines were under pressure and which lines were being used, and which lines were not. The evidence showed that the appellant knew that some lines were close to the surface of the ground (four inches), and which lines were deeply embedded in the ground (ten feet). Surely, the lines closer to the surface of the ground or those in the immediate proximity of the operation of the dragline bucket could have been shut down and the pressure released. There was evidence that even on the punctured toluene line when the pressure had been released after the dragline bucket had punctured it, a wooden peg was put in the hole and a piece of metal placed over the hole and it was welded as a patch on all four sides with the line still full of toluene, but not under pressure. There was no explosion or fire. The evidence further showed that the line pressure (atmospheric) could be released by opening a valve at the refinery site, and that the static pressure could be released by the draining of the line at least to a point below where the appellee was

working. We overrule this contention of appellant.

[16, 17] Appellant again argues that the improper operation of the dragline caused the injury. There was no direct evidence of the improper operation of the dragline and no requested issue. We agree as appellant argues, that the general rule is that one is not required to anticipate the negligent conduct of another. De Winne v. Allen, 154 Tex. 316, 277 S.W.2d 95. However, where the appellant has knowledge of facts which place him on notice that an accident might occur, such as in the instant case, the negligent conduct, if any, of another party does not prevent a finding of negligence on the part of the defendant. We do not believe that such contention on the part of appellant here has merit. We see no error in the failure to instruct the jury on anticipated negligent conduct nor the definition of a contractor, as neither instructions are determinative of this case, or if it was error it was harmless by virtue of the other findings by the jury. Rule 434, T.R.C.P. Appellant's points are overruled.

[18, 19] Appellant's sixteenth point contends that the trial court erred in permitting the opinions and conclusions of certain witnesses to be expressed as to whether it was safe or dangerous to use draglines to uncover pipelines carrying hydrocarbon materials. On the other hand, the appellant in its own brief stated that: "All the evidence in the case at bar demonstrated that it was *safe* to use a dragline to remove the overburden from the dock loading lines." Appellant complains that the trial court erred in failing to prohibit certain witnesses from testifying as to whether or not the use of a dragline to remove dirt from the top of the lines would be safe. One of the witnesses testified over objection as to the dangers of the use of draglines where there were existing pipelines carrying flammable hydrocarbons. Appellant on the other hand elicited testimony as follows:

"Q Assuming that there had only been ten inches of dirt over that pipe, in your opinion, was it safe to remove that dirt with a dragline?

A I would say that it wouldn't have been too hazardous, down to the point of the top of the pipe.

Q To use the dragline?

A To use the dragline, yes, sir.

Q Assuming, then, that the surface of the dirt was six inches above the top of that line, would it have been safe to use the dragline to remove that dirt?

A I would say that it wouldn't have been necessary. As far as safety is concerned, whether it would have been safe would hinge a whole lot on the conditions that existed there at the site * * *.

* * * * * *

A * * * I would say six inches would be getting pretty close to the point that if I—if I was the one making the decision to either use the dragline or a hand excavation, I probably would have said, 'Use hand excavation instead of the dragline', as a matter of convenience, and possibly safety."

The statement of facts is quite voluminous covering over one thousand pages. There was a lot of testimony concerning the operation of a dragline. There was considerable evidence concerning dragline operations offered repeatedly by appellee, and received without objection from the appellant. We hold that the overruling of the objections was not error since the evidence was cumulative. In any event since the appellant offered similar evidence from other witnesses concerning the same factual situation its objections will be deemed to be waived. If we be wrong concerning this, it is our opinion that the testimony was not determinative of any ultimate issue in the case as it turned out. We therefore hold that the errors, if any, in the admission of evidence complained of was harmless and

the error complained of was not such as was reasonably calculated to cause or probably did cause the rendition of an improper judgment in this case. Rule 434, T.R.C.P.; Medina Electric Cooperative, Inc. v. Ball, Tex.Civ.App., 368 S.W.2d 227; City of Gladewater v. Dillard, Tex.Civ.App., 312 S.W.2d 530; 1 McCormick & Ray, p. 26, § 27; Sharkey v. Hollums, Tex.Civ.App., 400 S.W.2d 353 (1966).

[20] In appellant's points seventeenth through twentieth, appellant argues that the trial court erred in excluding evidence from the jury as to certain alleged indemnity provisions in the rate schedule of appellant's standard general contract from Vickers (appellee's employer) to appellant. The contract between Vickers and appellant was oral. Vickers testified that prior to the commencement of the work on the job he was not shown the printed general conditions. After the accident had happened, Vickers did sign the purchase order containing the written indemnity agreement offered by the appellant. The rate schedule was introduced into evidence but the trial court physically cut out a clause in the contract before permitting it to go before the jury. This clause stated:

> "It is understood that all work done by us (appellee's employer) for your (appellant's) account is that of an independent contractor, and you are not liable for any of our acts of commission or omission resulting in injuries or damages."

It is appellant's argument that this clause should be admitted and considered by the jury so that (1) they would realize that Vickers was clearly an independent contractor, and (2) that it was intended by appellant and Vickers, that Vickers would be responsible for all acts, whether negligent or not, and that appellant would not be responsible therefor. We have already discussed the independent contractual relationship. If appellant was attempting to cast legal responsibility on appellee's employer by virtue of this contract, then this would be a law point or an action which was not pleaded by appellant, and it is not properly before us. Appellant does not refer us to any case where this type of evidence would be admissible for the purpose intended by the appellant. Appellant's point is overruled.

[21] Appellant next contends that the trial court erred in overruling its objections to the testimony of a certain witness concerning the details of a particular construction job done for the United States Navy where a new aviation gasoline line was joined to an existing line. We have carefully considered all of the testimony of this witness, the objections and the cross examination by the appellant. The witness was qualified as an expert and the testimony complained of was elicited in minute detail by appellant on cross examination. Any harm committed in permitting such testimony to go to the jury was cured by the elaboration on cross examination. We deem it harmless error, if any. Rule 434, T.R.C.P.; Hughes v. State of Texas, Tex.Civ.App., 302 S.W.2d 747, 1958 and cases therein cited.

[22] Appellant's last two points twenty-two and twenty-three, concern the damages awarded by the jury as being grossly excessive so as to demonstrate bias, prejudice and sympathy on the part of the jury; that the damages were so large that a remittitur should be required and that the verdict shows a complete disregard for the evidence. The appellee testified that he was welding with his hood down and noticed a foreign fire in the hole where he was working. He raised his welding hood and found that he was completely surrounded by a wall of flames. On extricating himself from the ditch his entire clothing was afire, save and except his boots. Most of his clothing was burned off. He stood for fifteen minutes being unable to sit down, while waiting on an ambulance. He was severely burned over eighty-five per cent of his body front and back with second and third degree burns. His entire face was covered with first degree burns with some resulting scarring. His ear was burned

deeply. When he was first brought to the hospital he was in profound shock and near death. His left arm and leg were burned very deeply involving the muscle and underlying tissue, leaving a loss of motion in his left elbow and his left hand and permanent injury to his left leg. Other parts of his body were burned to such a degree that there will be no regeneration of muscle and tissue. He was operated on twenty-one or twenty-two times. His treating physician testified that he was totally disabled and is permanently disabled from doing any active work that requires him to be out of doors. He remained in the hospital for three months, much of the time in severe pain which was not controlled by drugs because of possibility of addiction. After he was sent home in December, 1960, his treatment continued for a long time and involved extended physical therapy. His pain continued until and including the date of the trial (1964). It was stipulated that his medical expenses for the treatment of his injuries amounted to $19,806.52. Appellee's earnings prior to the accident were approximately $5,000.00 per year. One of the doctors testified that he will need future surgery to his left leg which was severely burned, including involvement of the underlying tissue. This leg had been bothering him up to the time of trial because of pain and swelling. Appellee was thirty-nine years of age at the time of the accident with a life expectancy of approximately thirty years. The jury awarded appellee $85,000.00 for past and present physical pain, mental suffering and loss of earning capacity, and $500.00 for future medical expenses. We hold that there was sufficient evidence to support the findings of the trial jury and we do not think that the verdict is excessive in view of the age and life expectancy of the appellee, the disability and the severity of the injuries he has suffered. Summers Road Boring, Inc. v. Thompson, 393 S.W.2d 690 (1965, Tex.Civ. App. ref. n.r.e.) and cases cited therein.

The judgment of the trial court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, Relator,

v.

Honorable Horace S. YOUNG and John Hogan, Respondents.

No. 210.

Court of Civil Appeals of Texas.

Corpus Christi.

May 26, 1966.

Original mandamus proceeding by railroad to order district court judge to set aside order declaring mistrial and to enter judgment that motorist take nothing by his suit for injuries suffered in railroad crossing accident. The Court of Civil Appeals, Sharpe, J., held that inability of jury to agree on whether motorist was faced with emergency on occasion of railroad crossing collision did not entitle motorist to mistrial in view of findings that he was contributorily negligent in failing to stop short of the railroad track under conditions prescribed by statute and in failing to keep proper lookout and in absence of finding that the emergency constituted the sole proximate cause of collision.

Writ granted; trial court directed to set aside order declaring mistrial and to enter judgment that motorist take nothing.

1. Automobiles ⇐247

Where a party has been found guilty of primary negligence proximately causing collision, finding that he was acting in an emergency is not conflicting absent finding that emergency constituted sole proximate cause of collision, and the finding of specific negligence overrides the general emergency issue finding, which will be disregarded in rendering judgment.

2. Negligence ⇐142

Finding that a person failed to keep proper lookout does not conflict with the finding that he was acting in an emergency.

NO. A-11582

IN THE

SUPREME COURT OF TEXAS

DELHI-TAYLOR OIL CORPORATION,

PETITIONER,

VS.

WILL RAY HENRY,

RESPONDENT

RESPONDANT'S MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF THE STATE OF TEXAS:

Respondant respectfully files this his Motion for Rehearing, under the provisions of Rule 515, Texas Rules of Civil Procedure and within the fifteen days provided by such rule, in order that the errors committed by the Honorable Court may be corrected and the ends of justice be served and that upon rehearing that the Court affirm the judgment of the Trial Court and the decision of the Court of Civil Appeals in favor of the Respondant; In the alternative that this Honorable Court remand the case for new trial in accordance with the Supreme Court's direction.

STATEMENT OF THE NATURE OF THE CASE

The statement of the nature of the case by the Petitioner in Petitioner's Application for Writ of Error, and adopted by the Respondant in his Reply to Petitioner's Application for Writ of Error is hereby adopted by reference for the sake of brevity.

PRELIMINARY STATEMENT OF FACTS

The preliminary statement of facts as stated in Respondant's Reply to Application for Writ of Error is hereby adopted by reference for the sake of brevity.

STATEMENT OF POINTS OF ERROR

FIRST POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 279, Texas Rules of Civil Procedure by not deeming any unsubmitted

issues as found in support of the judgment of the Trial Court.

SECOND POINT OF ERROR

The Supreme Court erred in refusing to apply the Rule of "Stare decisis" and overruling Galveston Houston Elect. Ry Company vs. Reinle, 113 Tex. 456, 258 SW2nd 803, (1924), thereby denying Respondant his day in Court.

THIRD POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 503, Texas Rules of Civil Procedure, which requires the Court to remand Respondant's case for a new trial.

FOURTH POINT OF ERROR

The Supreme Court erred in that by its decision Respondant has been denied due process of law under Article 1, Section 19 of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution.

ARGUMENTS OF POINTS OF ERROR

FIRST POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 279, Texas Rules of Civil Procedure, by not deeming any unsubmitted issues as found in support of the judgment of the Trial Court.

ARGUMENT UNDER FIRST POINT OF ERROR

The Court by its decision has failed to recognize and apply the provisions of Rule 279, Texas Rules of Civil Procedure. By such failure, the Court erred in its decision and such decision should be corrected and the decisions of the Trial Court and Court of Civil Appeals affirmed.

Rule 279, supra, provides, paraphrasing, that where a "ground of recovery . . . consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery . . . are omitted without request or objection, and there is evidence to support a finding thereon, . . . such omitted issue shall be deemed as found by the Court in such a manner as to support the judgment." The ground of recovery in Respondant's case stems from the rule of law that provides that an owner-occupier owes a duty to the employee of an independent contractor to take reasonable care to provide the employee a safe place in which to work or to warn him of the dangerous condition. The Supreme Court had, as it points out in its opinion, previously ruled in Galveston Houston Elect. Ry Company vs. Reinle, 113 Tex. 456, 258 SW2nd 803, (1924), that the warning required by this rule of law was to the employee (Respondant herein) and that warning to the employee's employer was not sufficient to satisfy the duty. At the time this cause of action came into being and throughout all of the proceedings up through presentation to the Supreme Court, this cause of action was prepared and presented in accordance with controlling law and precedents; to the effect that failure of the owner-occupier to

provide a safe place to work together with no warning to the employee by the owner-occupier of the dangerous condition rendered the owner-occupier responsible for injuries suffered by the contractor's employee, proximately caused by the dangerous condition. To establish, as Respondant did here, that the owner-occupier did fail to provide such a safe place in which to work, and admittedly failed to warn the employee, Respondant, the submission of the issue of warning to the employer was unnecessary to submit. At no point in the record is there any indication that Petitioner warned Respondant, which as the Court announced in the Reinle case, was required to discharge this duty. Therefore, under the controlling rule of law that existed, Respondant submitted the controlling issues under his ground of recovery and they were returned by the Jury favorable to him. Furthermore, assuming that the issue of warning should have been submitted or requested and was not, as occured here, under the provisions of Rule 279, supra, this Court is required to consider such issue as found in support of the judgment, which they have failed to do and therein have erred. Without conceeding whether the Court is correct in its reinterpretation of the satisfaction requirements of the duty to warn, the Court can announce the change in the law and affirm the lower courts in the instant case by adhering to the requirements of Rule 279, Texas Rules of Civil Procedure. Respondant respectfully requests the Court to give expression to Rule 279, supra, and find the unsubmitted and unobjected to issue of warning in support of the judgment of the Trial Court and the decision rendered by the Court of Civil Appeals.

Respondant would respectfully further point out that in connection with this same general error supra, the Court assumed the position of a fact finding body in determining that "the evidence established conclusively as pointed out herein, that the duty was not breached." Admittedly Respondant did not secure a Jury finding on warning but as has already been pointed out, under the existing rule of law such an issue was unnecessary and furthermore if it was, then the Court should under Rule 279, supra, find it in support of the judgment rendered in favor of the Respondant. Rule 274, Texas Rules of Civil Procedure, admonishes all that "Trials in the Supreme Court shall be only upon the questions of law . . ." "The Supreme Court has no jurisdiction over matters of fact." Mohundro vs. Matthews, 161 Tex. 367, 341 SW2nd 401, (1961). Decisions in the Trial Court and the Court of Civil Appeals are binding on the Supreme Court. " Pacific Fire Insurance and Company vs. Donald, 148 Tex. 277, 224 SW2nd 204, (1950), "Supreme Court may consider only evidence which tends to support implied findings in support of judgment and must disregard any that leads to contrary conclusion." Bishop vs. Bishop, 359 SW2nd 869. "It is the duty of the Supreme Court to view evidence and reasonable inferences there from most favorably in support of finding of Jury. Jecker vs. Western Alliance Insurance Company, 369 SW2nd 776, 371 SW2nd 904. Therefore Respondant respectfully requests that the Court reconsider its opinion in light of the above, find the unsubmitted issue of warning in support of the judgment and affirm the Trial Court and Court of Civil Appeals. In the alternative, Respondant requests that the Court express the changed rule of law

announced in this opinion and under the provisions of Rule 279, Texas Rules of Civil Procedure, affirm the Trial Court and Court of Civil Appeal. In the alternative Respondant moves the Court remand the case for new trial in accordance with its direction.

SECOND POINT OF ERROR

The Supreme Court erred in refusing to apply the Rule of Stare decisis" and overruling Galveston Houston Elect. Ry Company vs. Reinle, 113 Tex. 456, 258 SW2nd 803, (1924), thereby denying Respondant his day in Court.

ARGUMENT UNDER SECOND POINT OF ERROR

The rule of "Stare decisis" is designed to provide reliability and stability in the law. Persons subject to the law "should know what their legal rights are as defined by legal precedent and having conducted their affairs in reliance on such rights they should not have them swept away " Austad vs. Austad, 269 P2nd 284. The action taken by the Supreme Court in its opinion has effectively swept away the rights relied upon by Respondant. Who is to say that Will Ray Henry would have not conducted himself in such a way that he would have avoided injury altogether had the rule of law now announced by this Honorable Court been the rule of law on the day Henry was injured? Not only has the rule change altered who Respondant shall look to for his warning, but in addition how that warning shall be satisfied. Of possibly greater impact is the rule change on the preparation and presentation of Respondant's cause of action. No citations are necessary to point out the manifest injustice that

has been done. One need only consider briefly that had the Court followed the established rule of law laid down in Reinle, supra, this case would have been affirmed. It is so abundantly clear that had the law announced in this opinion been the controlling law, the preparation and presentation would have been to comply with that ground of recovery or another would have been found. However, as this cause of action now stands, Respondant has been denied even the opportunity to prepare and present his cause of action. The very least that should be expected to secure the true ends of justice in a situation where the rules of the game are changed, is that a rematch be declared; but here, the Court, after the winning team has played the game and won under the existing rules, changes the rule and declares with finality that the winner is now the looser. Where is there in such a decision even the resemblance of justice? There is none. For that reason, Respondant respectfully moves the Court to reconsider its decision and if the change in the rule of law must stand, then at least extend to the Respondant the opportunity to play the game under the new rule by ordering that this case be remanded for a new trial.

The action by the Supreme Court does not do justice to the decision in the Reinle Case. In that decision the Court painstakingly plowed through the question of control as to the detail of the work being done. In the opinion here rendered, Respondant respectfully submits that the Court generalized a rule of law thereby denying to this area of the law the detailed analysis that justice and sound law demands.

As the Court in the Reinle case recognized the party "employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand a person causing something to be done, the doing of which casts on him a duty, cannot excape the responsibility attaching to him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor . . . but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Citing the Supreme Judicial Court of Massachusetts in Cobat vs. Kingman, 166 Mass. 403, 44NE 344.

The Supreme Court states in their opinion "This holding brings us face to face with the question whether an adequate warning to an independent contractor or one supervising his work will discharge the duty of the land owner-occupier to warn the employees of the independent contractor; and we hold it will." As pointed out earlier the Supreme Court is a Court for the trial of law questions only. The facts are established by the lower courts; the interpretation and application of the law to those facts and those facts alone is the obligation of the Supreme Court. The fact question of control was precisely answered by the Jury in the Trial Court and affirmed by the Court of Civil Appeals and this writer suggests that the Supreme Court has ignored the fact that Petitioner was in absolute control of the premises and the dangerous condition. Historically the question of control has been of

supreme importance in establishing what action would satisfy this duty; furthermore, whether this duty, once established could be delegated to another. Yet in the instant opinion the Supreme Court has failed to even consider the question (fact) of control before establishing a sweeping generalization that regardless of who has control, " . . . an adequate warning" to the employer satisfies the duty owed to the employee by the owner-occupier. What of the intrinsically and inherently dangerous situations or conditions? This writer submits that the Supreme Court could have just as easily have found that the toluene lines were inherently dangerous as they found that the " . . . evidence establishes conclusively that the duty to warn was not breached." Assuming this to be true, are we now to consider that the owner-occupier who has absolute control over an inherently dangerous condition can discharge his duty, even delegate the duty to warn or provide a safe place to work by simply giving" . . . an adequate warning to the employer-independent contractor? What has happened to non-delegible duty?

The endless variations in fact situations that are encompassed by the general area of owner-occupier-independent contractor's employee are numberless. To attempt, as the Court has here, to apply a blanket rule of law to such a vast area of materially different situations is to do injustice to this entire area of the law.

The Supreme Court in the Reinle Case continues, "There is no doubt that the independent contractor was under the duty to exercise

ordinary care to give warning to its employees . . . Breach of this duty is not the basis of the interurban company's liability. It is the breach of the interurban company's own independent duty for which it is answerable. Failure of the contractor to perform its duty would in no wise relieve the interurban company from responsibility for the consequences of failure to perform its own duty to the contractor's employees. (emphasis added).

Considerable time in preparation and presentation were devoted by Respondant in establishing this independent duty owed by Petitioner, Delhi. The Supreme Court's generalized expression that the owner-occupier's duty to employees of independent contractor is satisfied when the independent contractor is warned by the owner-occupier does not recognize the varying degrees of control over work being performed that were recognized in the Reinle case. This is and in a long list of cases, some cited by this Court in its opinion, not characteristic of the Supreme Court's decisions. It might well be that under a given set of facts that an owner-occupier's warning to an independent contractor of dangeous conditions would satisfy the duty owned by the owner-occupier to the contractor employees, but not under these facts. Here the Jury found that Delhi controlled the premises housing the dangerous condition. The Court in this opinion has lumped all fact situations involving owner-occupier invitee independent contractor employees into a general catagory, which is contray to the development of the law and diametricly opposed to the reasoning of well settled law.

At the risk of citing a majority opinion that holds contrary to Respondant's position here, consider the Court's statement in the Gulf Oil vs. Bivens case, where speaking to the general statement that an owner-occupier is under a duty to furnish a safe place for employees of an independent contractor, the Court says, "This statement is too broad and is an oversimplification of the principle". In the opinion rendered by this Court in this case, Respondant respectfully submits that the Court's ruling is too broad and is an oversimplification of this principle. This duty under the existing facts cannot be discharged by delegating that duty to another party. The well chosen words of the dissenting opinion in Gulf Oil Corporation vs. Bivens, 276 F2nd 753, are urged to be carefully considered.

> "Here the Court announces a rule which is both internally inconsistent and in conflict with the traditional, and here Texas, approach. As to Restatement #343 (a), the Court recognizes that it was a jury issue whether the iron sulfide gas was present and was a danger of which Bivens was ignorant. In other words, this was tested by the facts. But it then abandons the factual inquiry for jury resolution as to the same kind of issues presented in #343 (b). In the very nature of things, is not the question whether the occupier "(1) has no reason to believe" one of fact? By the same token, is not an inquiry whether the employees "(2) will discover the condition" an obvious one of fact, not law? Is it not even more so as to the crucial one whether the employees will "(3) realize the risk involved therein"?"
>
> "It is entirely possible that on the record of a particular case reasonble minds could accept only the conclusion that a prudent occupier, having given

notice of the peculiar hazard, would not have reason to believe that the employees would be ignorant of the condition or its hazards. In that situation a directed verdict would be compelled. But ordinarily it will not be, as the Court now announces, a decision as a matter of law. What a prudent occupier "has reason to believe" depends on the total setting. This includes the nature or kind of dangerous condition, the kind or type of hazard presented, and a balancing of the possible capacity for harm of an extraordinary nature against the likelihood of the independent contractor effectively relaying the warning to his employees. This depends on facts. And where facts permit conflicting inferences, it is for the trier of fact, not the judge, to declare the result."

"The Court, listing precedents for the rule announced, ignores altogether the cases to the contrary. Both the Ninth and Second Circuits reject this rule that notice to the independent contractor is either notice to the employee or cuts off his rights. Sullivan vs. Shell Oil, 9 Cir., 1956, 234 F2nd 733; Anderson vs. Lorentzen, 2 Cir., 1947, 160 F2nd 173. The Sullivan Case from the Ninth Circuit is particularly persuasive since as that opinion reflects, Texas and California concepts are parallel on the open and obvious danger and voluntary assumption of risk principles." Gulf Oil Corporation vs. Bivens, supra.

At this point Respondant would respectfully point out to the Court some distinguishing characteristics of the cases cited in support of its announced rule of law change. In Tyler vs. McDaniel, 386 SW2nd 552, the injured employee had knowledge of the dangerous condition. It is uncontroverted that Will Ray Henry did not know of the dangerous condition.

It is Respondant's purpose here in pointing out these distinguishing points to add emphasis to the proposition that this area of the law

is not subject to simplification and generalization. Again, not conceeding that the Court is correct in its opinion in this case, it cannot be said in good faith that under a given set of facts that the reasoning of the Court would not be applicable. However, it is Respondant's position that the facts, as were found by the Trial Court, just do not lend themselves to this application of this rule of law. If, however, the Court persists in its determination that the facts are subject to this new rule of law just announced, then Respondant submits that the case should be remanded to be retried under such new rule of law.

In Texas Electric vs. Holt 249 SW2nd 662, the Court in that case was dealing with facts of re-entry into the work area after the work that was to be done had been done and the premises released to the owner-occupier. There was no re-entry in the instant case. Respondant had just little more than arrived to commence his work when the injury was sustained. Even in Gulf Oil vs. Bivens, supra, there is a distinguishing element. In that case, the owner-occupier did not retain control of the premises and had no representative present at the sight of the work. It is an uncontrovered fact that Petitioner retained control of the premises and that a representative of the Petitioner was present at the time the injury was suffered by Respondant. In Turner vs. West Texas Utilities Company, 290 F2nd 191, (cited by the Court), the dangerous condition that the Court was concerned with in that case was not located on the premises of the owner-occupier and the owner-occupier had no control whatsoever over

the dangerous condition complained of. There can be no question about the dangerous condition, not only being within the premises of this Petitioner, but furthermore the control over the dangerous condition was absolutely in the Petitioner.

In the Strom vs. New York Telephone Company, 200 NE 659, the Court in reciting the facts of this case clearly indicates the distinguishing factor, and in that case, the Defendant has no control of or the details of the work. A representative of the Defendant owner-occupier went to the location and specifically warned the immediate supervisor and foreman of the injured employee. Further this same representative specifically warned the District Superintendent of the dangerous condition. The Court in its opinion characterizes the injured employee as " . . . an employee . . . of one who is a lessee of the rights and property in and upon the pole and whose acts helped to create the very situation out of which the accident occured." Respondant was not an employee of a lessee of the premises upon which the work was to be conducted. No representative of the Petitioner gave such warnings of danger to Respondant's employer. Respondant's employer was not using the premises or the facilities in the conduct of this business. The differences in the Storm Case and the instant case are abundantly clear and again point out the falacy of a generalization of the duty owed and satisfaction thereof in cases of owner-occupier independent contractor's employee.

In Schwarz vs. General Electric Realty Corporation, 126 NE2nd 906, the Defendant had no control over the dangerous condition that existed. Furthermore, the facts were established in this case that the proximate cause of the injury was the negligence of the employer of the injured employee. Furthermore, the Court declares. . . "It is to be noted that the work being performed was not directly with reference to construction on or repair of the premises themselves, but was an incidental operation for the benefit of the independent contractors. It was the independent contractors and not the owner's operation and it was entirely under the supervision and control of the former." In the instant case, no one has ventured the proposition that Respondant's employer had control over the premises housing the dangerous condition. The findings of the Trial Court Jury that the proximate cause of the injury was the actions or actually the lack of actions by the Petitioner, owner-occupier, cannot be ignored. It is also clear that the operations being conducted were for the benefit of the Petitioner and being performed at the place that Petitioner dictated. Respondant would again point out that under Rule 274, Texas Rules of Civil Procedure, the questions for the Supreme Court are only questions of law and the Court is required to construe the facts as established in the Trial Court or the inferences therefrom most favorably in support of the judgment there rendered.

Respondant would respectfully submit to the Court that the above reasoning and indicated distinguishing characteristics of the cases

cited in support of its decision, point clearly to the fact that the Court has erred in overruling the Reinle decision in such summary fashion, and in so doing has opened a Pandora's Box for generalizations where generalizations cannot exist. Therefore, Respondant respectfully request the Court to reconsider its opinion in a rehearing and that upon such rehearing, the Court affirm the Trial Court and Court of Civil Appeals.

THIRD POINT OF ERROR

The Supreme Court erred in failing to apply the provisions of Rule 503, Texas Rules of Civil Procedure, which requires the Court to remand Respondant's case for a new trial.

ARGUMENT UNDER THIRD POINT OF ERROR

Rule 503, Texas Rules of Civil Procedure, provides that the Supreme Court may remand a case for another trial, if the error law "amounted to such a denial of the rights of the Petitioner (Respondant in the instant case) as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case or was such as probably prevented Petitioner (Respondant in the instant case) from making a proper presentation of his case to the Appellate Court." The second paragraph, Rule 503, is inapplicable since the error was not committed by either the Trial Court or the Court of Civil Appeals, but originated in the Supreme Court by its own declaration in the Reinle Case. Although the rule speaks specifically to errors committed by the Lower Courts, the rule in its underlying purpose is designed to prevent an error from dictating an incorrect judgment and to provide the parties to

the lawsuit with the opportunity to present their case properly. The errors admittedly committed by the Supreme Court in the Reinle Case and which it seeks to correct by its opinion in the instant case has without question prevented the Respondant from presenting his cause of action properly and at least, insofar as the Supreme Court has decided, resulted in the rendition of an improper judgment. This is no less error than any error that could be committed by the Lower Courts. As a practical matter this error is far more devastating to the Respondant's case, since both the Respondant and the Lower Courts considered, and rightfully so, the rule of law under which Respondant prepared and presented his case to be and it was at the time, the established rule of law. Therefore, Respondant respectfully requests that the Court recognize the purpose and intent of Rule 503, Texas Rules of Civil Procedure, and that the Court remand this case for a new trial under the newly announced rule of law.

FOURTH POINT OF ERROR

The Supreme Court erred in that by its decision Respondant has been denied due process of law under Article 1, Section 19 of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution.

ARGUMENT UNDER FOURTH POINT OF ERROR

The Supreme Court has erred in overruling the Trial Court and the Court of Civil Appeals by announcing a rule of law which is diametricly opposed to the admitted controlling rule of law relied upon by Respondant in the Trial

Court and the Court of Civil Appeals and has thereby denied Respondant due process of law under the provisions of the Constitution of the State of Texas and the Fourteenth Amendment of the United States Constitution.

The Supreme Court has erred in rendering rather than remanding for new trial their opinion overruling the Trial Court and the Court of Civil Appeals and by such error has denied to Respondant due process of law under the provisions of the Constitution of the State of Texas and the Fourteenth Amendment of the United States Constitution.

Article 1, Section 19, Bill of Rights, Texas Constitution:

> Section 19, "Deprivation of life, liberty, etc; due course of law. Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land."

Respondant respectfully would show this Honorable Court that he has been denied due process of law by this Court. The Court, has in the instant opinion, declared a change in the rule of law which prevents Respondant's recovery for damages which he has suffered. In order to accomplish this result the Supreme Court was required to overrule an existing decision and rule of law, forty-three years on the books of this State. In the preparation of this case, Respondant was required to rely upon the controlling rule of law. Doing so, according to the procedural mandates of the State law, Respondant, confident of his position since that position was rooted in the decisions of the Supreme Court of the State, prepared and presented his case under that rule of law. In the final stage before the very Court which had

established the rule of law relied upon by the Respondant, that same Court changed the rule. Notice, the Court did not declare that the Respondant had relied upon the wrong rule of law, but that the rule of law relied upon was now to be changed.

"The term 'due process of law' is synonymous with ' the law of the land', its essential elements are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case and it means a law which hears before it condemns, which proceeds on inquiry and which renders judgment only after trial." Masonic Grand Chapter of Order of Eastern Star vs. Sweatt, 329 SW2nd 834, Ref. n.r.e. There is no conceivable way that Respondant can be considered to have had notice that the law he relied upon was to be declared changed to directly oppose him. It all but goes without saying that the practical result of this decision is that Respondant was never given the opportunity to be heard. Furthermore, it must be abundantly clear that by this decision of the Supreme Court, the Respondant has been forced to prepare and present his cause of action and then be admonished as to what the rule of law was that he was subject to.

Although it might appear that Respondant has availed himself of the judicial system, it is evident that as a practical matter, Respondant has been denied, by this decision of the Supreme Court, the normal procedures afforded a litigant and thereby Respondant has been denied due process of law under both the Constitution of the State of Texas and the United States.

Constitution, Fourteenth Amendment. Respondant recognizes that "The reversal of a former decision to the prejudice of one of the parties or a departure by the Court(s) of the State from a rule of property established by prior decision(s) does not violate the guaranty", in and of itself. 12 American Jurisprudence, #577 p. 273, Constitutional Law. However, the article goes on to say, "If there has been a full hearing or opportunity for hearing, . . . "It is Respondant's position that such full hearing has been denied him. Consider further in 12 American Jurisprudence, #622, Right to Prove and Recover Damages. "It has been said that due process of law guarantees an orderly procedure in Court for the ascertainment of damages for an injury to the end that the person injured shall have a proper and adequate remedy." " . . . the Courts have treated the right to damages as a substantial one of which a person cannot be deprived except by due process of law." Here the Respondant is to be denied his recovery; and to be deprived of his right to recover the damages he has suffered. Respondant requests that the Court reconsider its opinion and that upon rehearing, affirm the Trial Court and the Court of Civil Appeals or remand this case for a new trial.

Without repeating the statement and argument in the above point of error the same position is advanced for the error committed by the Court in rendering rather than remanding this case for a new trial. Additionally, Respondant would respectfully point out that the Court by reversing and rendering the opinion rather than remanding has again denied Respondant due

process of law under both the United States and Texas Constitutions. If it is the considered wisdom of this Court that the rule of law announced in this case is to be the rule of law that controls, then Respondant is justly entitled to prepare and present his cause of action under such rule of law. This is not to say that had the Respondant relied upon an erronous rule of law he would be so entitled, but since by the Courts own admission, the rule relied upon was the law at the time this case was prepared and presented, but has now been changed, then the Respondant's right to prosecute his cause of action under that rule has been denied and thereby Respondant has been denied due process of law.

Again, respectfully, Respondant requests this Honorable Court to grant this motion for rehearing and that upon such rehearing that the Court remand the case for a new trial under the rule of law announced in this opinion.

CONCLUSION

The owner-occupier, Petitioner, owed a duty to the employee of the independent contractor invitee to provide a safe place to work or to give warning of the existing dangeous condition to the employee. The Jury in the Trial Court determined that Petitioner-Defendant failed to provide a safe place for the employee-Respondant-Plaintiff to conduct his work. Rule 279, Texas Rules of Civil Procedure, requires that any unsubmitted issues that are required for recovery are to be deemed as found in support of the judgment. This Court has determined that the duty owed by the

owner-occupier to the employee can be satisfied by ". . . an adequate warning given to the employer . . . ." The correct issue that Respondent failed to submit, as a result of the Supreme Court's decision was whether or not the employer of Respondent-employee had received adequate warning from the Petitioner. This opinion does not change the undisputed fact that no issue on this point was submitted. Rule 279, Texas Rules of Civil Procedure, remains the same. This writer submits that if the Court has determined that adequate warning to the employer will satisfy the duty to provide a safe place in which to work or to warn of the dangerous condition, that regardless of this conclusion, the judgment in this case must be affirmed under the provisions of Rule 279, Texas Rules of Civil Procedure.

Respondent, as a result of the Court's rendered decision, has been denied the opportunity to prepare and present his cause of action fully and as a result of this, has been denied the constitutionally guaranteed due process of law.

WHEREFORE, PREMISES CONSIDERED, Respondent prays this Honorable Court to grant this Motion for Rehearing and that upon such rehearing, the Court affirm the Trial Court and Court of Civil Appeals. In the alternative Respondant prays the Court to remand this case for new trial according to the dictates of this Court.

Respectfully submitted,

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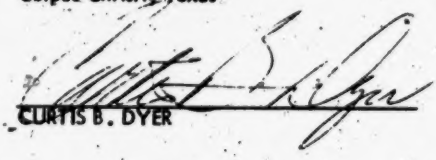
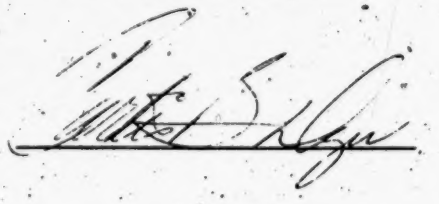
By 
CURTIS B. DYER

I hereby certify that a true copy of the foregoing Motion for Rehearing was served on Mr. James C. Watson, Keys, Russell, Watson & Seaman, 18th Floor Driscoll Building, Corpus Christi, Texas, Attorney for Petitioner, by mailing the same to his office by United States Certified Mail on the 14th day of June, 1967.



Rule 279, Texas Rules of Civil Proceedure, Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or reqested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

(Emphasis added)

Rule 503, Texas Rules of Civil Proceedure, May Remand

If the judgment of a Court of Civil Appeals shall be reversed, the Supreme Court may remand the case either to the Court of Civil Appeals from which it came or to the district court for another trial.

Provided, first, that no judgment shall be reversed on the ground that an error of law has been committed by the trial court in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the petitioner from making a proper presentation of his case to the appellate courts; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal to act, by either the trial judge or any judge or official employee of the Court of Civil Appeals, shall prevent the proper presentation of a cause to the Supreme Court, and be such as may be corrected by the judge or official below, then the judgment shall not be reversed for such error, but the

Supreme Court will direct the said judge or official to correct the error, and thereafter the Supreme Court will proceed as if such erroneous action or failure to act had not occurred.

Amended by order of March 31, 1941.

(Emphasis added)

Rule 1, Texas Rules of Civil Procedure, Objective of Rules

The proper objectives of rules of civil procedure is [are] to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least espense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

(Emphasis added)